

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:2:NEW:2:TL-N-6898-00
RWMopsick

date: **FEB 22 2001**

to: Insolvency
Attn. Tom Corcoran, Chief, Advisory Unit

from: Associate Area Counsel
(Small Business/Self-Employed:Area 2)

subject: [REDACTED] SSN [REDACTED]

This is in response to a memorandum which we received by fax from your office on November 24, 2000 with regard to the subject taxpayer.

ISSUE

Whether there is a statute of limitations problem when the Service: (1) makes a joint assessment of the I.R.C. § 6653(b) fraud penalty within the 150-day period the statute of limitations is tolled, in a case where no taxpayer appeal is filed, pursuant to § 6503; (2) discovers after such 150-day period that the fraud penalty should have been assessed against the husband only; and (3) abates the assessment as to the wife and consequently transfers the joint assessment from master file to a single liability against the husband on nonmaster file.

ANSWER

There is no statute of limitations problem when the Service (1) makes a joint assessment of the § 6653(b) fraud penalty within the suspension period under § 6503, (2) discovers after such period, which was 150 days in this case, that the fraud penalty should have been assessed against the husband only, and (3) abates the assessment as to the wife and consequently transfers the joint assessment from [REDACTED] to a single liability against the husband on [REDACTED]. The change from a joint liability against the husband and wife on [REDACTED] to an individual liability on [REDACTED] is not an assessment against the husband within the meaning of § 6203, but rather an internal bookkeeping change. Under § 6203, an assessment is made by recording the taxpayer's name, address, and tax liability.

The facts of the case as we understand them are as follows:

For the years [REDACTED], [REDACTED], [REDACTED], and [REDACTED], [REDACTED] and his wife, [REDACTED], jointly filed Forms 1040. The Service examined these returns and issued a statutory notice of deficiency. The relevant issues were (1) whether the [REDACTED] had unreported income stemming from [REDACTED]'s involvement in a corporate bribery/kickback scheme, and (2) whether [REDACTED] was liable for the fraud addition to tax pursuant to I.R.C. §6653(b).

The [REDACTED] filed a petition with the United States Tax Court. The Court ruled, in [REDACTED], T.C. Memo [REDACTED], that although the [REDACTED] were jointly and severally liable for the proposed deficiencies, only [REDACTED] would be liable for the fraud penalty.

In its opinion published on [REDACTED], the Court ruled that a Decision would be entered under Tax Court Rule 155. A final Decision was entered on [REDACTED]. The Service timely assessed, on [REDACTED], the deficiencies and the fraud additions pursuant to the Court's Decision.

The Service, however, erroneously assessed the fraud addition against both [REDACTED] and [REDACTED]. The Service, it seems, should have input [REDACTED]'s in the joint [REDACTED] (" [REDACTED] ") [REDACTED] in order to post the deficiency amounts, and created [REDACTED] (" [REDACTED] ") accounts for [REDACTED] for the purpose of posting the fraud amounts by inputting [REDACTED]. This was not done. Instead, the Service assessed the fraud addition on the joint [REDACTED].

ANALYSIS

Timeliness of Assessment

Section 6501(a) provides the general rule that a tax must be assessed within 3 years of the filing of a return. Section 6503(a) provides that the running of the limitations period on assessment or collection is suspended during the period during which the IRS is prohibited from assessing or collecting a deficiency, plus 60 days. Thus, when a statutory notice of deficiency is issued by the IRS, the running of the statute of limitations is suspended for the 90-day period during which the taxpayer may file a petition with the Tax Court, plus 60 days.

If the taxpayer files a petition with the Tax Court within the 90-day period following issuance of a deficiency notice, the suspension terminates at the end of a period of 60 days after the Tax Court's decision becomes final. Id. Similarly, if the

taxpayer does not appeal a Tax Court decision the assessment period is suspended until the Tax Court decision becomes final (i.e., 90 days after the entry of the decision) plus 60 days. See Hans v. United States, 921 F2d 81 (6th Cir. 1990).

Here, the Decision became final on [REDACTED], i.e., [REDACTED] days after the [REDACTED] date of entry. Thus, the suspension period in this case runs the 150 days from [REDACTED] to [REDACTED]. The assessment in this case, made on [REDACTED], is not violative of the statute of limitations because it was made within 60 days of the date the Tax Court decision became final and before the statute of limitations had run.

Even if not made within 60 days of the decision becoming final and before the general three statute of limitation had run, the assessment is also probably not violative of the statute of limitations because the court determined that a fraudulent return was filed and that the husband, [REDACTED], is liable for the \$ 6653(b) fraud penalty. See § 6501(c)(1) which provides an exception to the general three-year assessment rule in cases where a false or fraudulent return is filed by a taxpayer with the intent to evade tax. If the exception set forth in §6501(c)(1) is applicable, the assessment may be made at any time.

Fraud Penalty Abatement; Creation of [REDACTED] Account

Your Office believes that the erroneous assessment of the fraud addition against [REDACTED] constitutes an administrative error, and, therefore, there would be no bar to correcting its records at this time. You propose that the [REDACTED] fraud assessments be abated in full and that [REDACTED] accounts be established for [REDACTED]. The [REDACTED]'s would show an assessment date of [REDACTED] for purposes of correctly computing interest.

It is our position that the statute of limitations period is not impacted by abatement and the remedy that you propose. I.R.C. §6203 provides that an assessment is made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Here, the original joint assessment was timely made against [REDACTED] and [REDACTED] on [REDACTED]. It was not until after the expiration of the statute of limitations that the Service discovered its error of having assessed the fraud addition against both [REDACTED] and [REDACTED]. The discovery of the error required the Service to abate the assessment as to [REDACTED]. Without abatement, [REDACTED] and [REDACTED] would remain jointly and severally liable for the fraud additions, a result which clearly

was not contemplated by the Tax Court. Once it is abated as to [REDACTED], the assessment should be transferred to [REDACTED] in order to reflect the change from joint to individual liability. [REDACTED] was at the time of assessment solely responsible for the fraud additions.

This change from a joint liability against [REDACTED] and [REDACTED] on [REDACTED] to individual liability against [REDACTED] only on [REDACTED] is not as assessment against [REDACTED] within the meaning of § 6203 that would otherwise be outside the statute of limitations. It will not constitute a new assessment as to [REDACTED]; it is merely an internal bookkeeping change. The assessment as to [REDACTED] occurred on [REDACTED], within the statute of limitations.

CONCLUSION

We agree that the erroneous assessment of the fraud penalty against both the [REDACTED] constitutes an administrative error. Therefore, we are in accord with your proposal to abate the [REDACTED] fraud assessments, that you create a [REDACTED] account for the purpose of recording the fraud additions against [REDACTED] only, and that you proceed with making this correction.

Our file in this matter is now closed. Should you have further questions, you may call Robert Mopsick at (973) 645-2627.

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By: 

ROBERT W. MOPSICK

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CC: Advisory Opinion, TL